Supreme Court, U.S.
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No. 96-1654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed April 18, 1997
Certiorari Granted December 12, 1997

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* All documents contained within the Joint Appendix are reproduced in full without alteration. No typographical errors contained in the original documents have been corrected.

RELEVANT DOCKET ENTRIES

I. BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

United States v. Frank J. Muscarello, No. 95-2-E

1.	1/5/95	INDICTMENT in United States District Court for the Eastern District of Louisiana filed.
2.	5/25/95	PLEA AGREEMENT as to Frank J. Muscarello filed.
3.	5/25/95	RE-ARRANGEMENT of Frank J. Muscarello and guilty plea entered.
4.	3/8/96	MOTION to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello filed.
5.	4/4/96	MEMORANDUM IN OPPOSITION by the United States to the motion to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello filed.
6.	4/10/96	HEARING on motion to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello held.
7.	4/11/96	ORDER by Judge Marcel Livaudais granting motion to quash and/or to dismiss count 3 of the indictment as to Frank J. Muscarello entered.
8.	4/19/96	MOTION by the United States for reconsideration of "quash and/or dismissal order" of April 11, 1996 as to Frank J. Muscarello filed.
9.	5/7/96	ORDER by Judge Marcel Livaudais denying motion by the United States for reconsideration of "quash and/or dismissal order"

of April 11, 1996 as to Frank J. Muscarello entered.

10. 6/7/96 NOTICE OF APPEAL by the United States from Judge Marcel Livaudais' order entered on May 7, 1996.

II. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. Frank J. Muscarello, No. 96-30591

1. 8/5/96 MERITS BRIEF of appellant United States filed.

2. 9/4/96 MERITS BRIEF of appellee Frank J. Muscarello filed.

3. 2/13/97 OPINION of the United States Court of Appeals for the Fifth Circuit filed.

III. BEFORE THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

United States v. Frank J. Muscarello, No. 95-2-E

1. 4/16/97 SENTENCING of Frank J. Muscarello.

IV. BEFORE THE SUPREME COURT OF THE UNITED STATES

Frank J. Muscarello v. United States, No. 96-1654

1. 4/18/97 PETITION of Frank J. Muscarello for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed.

2. 12/12/97 PETITION of Frank J. Muscarello for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit granted and case consolidated with No. 96-8837, *Donald E. Cleveland and Enrique Gray-Santana v. United States*.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INDICTMENT FOR VIOLATIONS OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND THE FEDERAL GUN CONTROL ACT OF 1968

UNITED STATES OF AMERICA	CRIMINAL DOCKET NO. 95-002
v.	SECTION:
FRANK J. MUSCARELLO, SR. VINCENT J. PARDO GARY R. MORGAN	VIOLATION: 21 USC § 841(a) (1) 21 USC § 846 18 USC § 924(c)(1) 21 USC § 853 21 USC § 2

The Grand Jury charges that:

COUNT 1

On or about the December 8, 1994, in the Eastern District of Louisiana, the defendants FRANK J. MUSCARELLO, SR., VINCENT J. PARDO, and GARY R. MORGAN did knowingly and intentionally combine, conspire, confederate and agree with each other to distribute a quantity of marijuana, a Schedule I drug controlled substance; in violation of Title 21, United States Code, Section 841 (a) (l), all in violation ox Title 21, United States Code, Section 846.

COUNT 2

On or about December 8, 1994, in the Eastern District of Louisiana, the defendants FRANK J. MUSCARELLO, SR., VINCENT J. PARDO, and GARY R. MORGAN did knowingly and intentionally distribute a quantity of marijuana, a Schedule I drug controlled substance, all in violation of Title 21, United

States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

On or about December 8, 1994, in the Eastern District of Louisiana, the defendant FRANK J. MUSCARELLO, SR. did knowingly use and carry a firearm; that is, a Smith & Wesson, .38 caliber revolver, serial number 1J17140, during and in relation to the commission of a drug trafficking crime for which he may be prosecuted in a court of the United States, to wit: distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 18, United States Code, Section 924(c)(1).

NOTICE OF FORFEITURE

As a result of the foregoing offenses, the defendants FRANK J. MUSCARELLO, SR., VINCENT J. PARDO, and GARY R. MORGAN shall forfeit to the United States any and all property constituting or derived from any proceeds the said defendants obtained directly or indirectly as a result of the said violation and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the violations alleged in Counts 1, 2 and 3 of this indictment, including, but not limited to the following:

1. A 1989 Ford F150 Pick-up truck, bearing Louisiana License plate number S170448, with Vehicle Identification Number (VIN) 1FTDF15N6KNA144, registered to the defendant FRANK J. MUSCARELLO, SR.

2. A 1993 GMC Sierra Club Coupe Pick-up truck, bearing Louisiana License Plate Number S206774, with Vehicle Identification Number (VIN) 2GTEC19K7P1546929, registered to the defendant GARY R. MORGAN.

3. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property; all in violation of Title 21, United States Code, Sections 841(a)(1) and 853.

A TRUE BILL:

/s/ illegible
FOREPERSON

/s/ Eddie J. Jordan, Jr.
EDDIE J. JORDAN, JR.
UNITED STATES ATTORNEY
Bar Roll No. 1450

/s/ Jan Maselli Mann
JAN MASELLI MANN
Assistant United States Attorney
Chief, Criminal Division
Bar Roll No. 9020

/s/ John F. Murphy
JOHN F. MURPHY
Assistant United States Attorney

New Orleans, Louisiana
January 5, 1995

PLEA AGREEMENT

May 25, 1995

Honorable Marcel Livaudais, Jr.
United States District Judge
United States Courthouse
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

Re: United States v. Frank Muscarello
Criminal Docket No. 95-002 "E"

Dear Judge Livaudais:

In compliance with the holding of *Bryan v. United States*, 492 F.2d 775 (1974), and with Rule 11 of the Federal Rules of Criminal Procedure, the Government wishes to acknowledge the following agreement between the Government and Frank Muscarello, the defendant, in the above-captioned proceeding. Defendant's undersigned counsel, J. Garrison Jordan and Ron S. Macaluso, have reviewed the terms of this agreement; J. Garrison Jordan and Ron S. Macaluso have been advised by the defendant that the defendant fully understands the terms of this agreement.

The defendant has agreed to plead guilty to all three counts in the indictment charging conspiring to distribute marijuana, in violation of Title 21, United States Code, Section 846; distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1); and use of a firearm during a drug trafficking offense, in violation of Title 18, United States Code, Section 924(c)(1).

The defendant further understands that the maximum penalty defendant may receive should his plea of guilty be accepted is a minimum mandatory penalty of five years imprisonment and a maximum of 15 years imprisonment, and/or a fine of $750,000, or the greater of twice the gross gain to the defendant or twice the

gross loss to any person, under Title 18, United States Code, Section 3571.

It also is understood that the Court may order restitution to any victim in this case under the provisions of Section 3663 of Title 18, United States Code, if the Court finds it appropriate to do so. The defendant agrees that any restitution imposed will be non-dischargeable in any bankruptcy proceeding and that defendant will not seek or cause to be sought a discharge or a finding of dischargeability as to the restitution obligation.

Further, the defendant understands that a mandatory special assessment fee of $150 shall be imposed under the provisions of Section 3013 of Title 18, United States Code. This special assessment must be paid on the date of sentencing. Failure to pay this special assessment may result in the plea agreement being void.

The defendant further understands that the Court, in imposing a sentence of a term of imprisonment, may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment for a period of up to three (3) years, pursuant to Title 18, United States Code, Section 3583. Supervised release is a period following release from prison during which defendant's conduct will be monitored by the Court or the Court's designee. Defendant fully understands that if defendant violates any of the conditions of supervised release that the Court has imposed, defendant's supervised release may be revoked and defendant may be ordered by the Court to serve in prison all or part of the term of supervised release.

The defendant understands that any discussions with defendant's attorney or anyone else regarding sentencing guidelines are merely rough estimates and the Court is not bound by those discussions. The defendant additionally understands the Court could impose the maximum term of imprisonment and fine allowed by law, including the imposition of supervised release.

The defendant hereby expressly waives the right to appeal his sentence on any ground including any appeal right addressed in

Title 18, United States Code, Section 3742 and the defendant further agrees not to contest his sentence in any post-conviction proceeding, including but not limited to a proceeding under Title 28, United States Code, Section 2255. The defendant, however, reserves the right to appeal the following:

(a) Any punishment imposed in excess of a statutory maximum, and

(b) Any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court.

This plea agreement is predicated upon the fact that the defendant agrees to submit to interviews whenever and wherever requested by law enforcement authorities. The defendant understands he must be completely truthful. The defendant also agrees to appear before any Grand Jury or trial jury and to testify truthfully. The defendant understands if he is not truthful, this agreement will be null and void and defendant may be prosecuted for perjury or making false statements. The defendant agrees neither to implicate anyone falsely nor to exculpate or protect anyone falsely. The defendant further agrees to immediately advise the Government as to any person defendant believes to be violating the law and defendant agrees to assist the Government with regard to the investigation and prosecution of criminal conduct.

In the sole determination of the United States Attorney, should it be determined that the defendant has provided substantial assistance, the United States will file a motion to depart below the defendant's applicable guideline range and upon such a determination, the government will recommend to the court that the defendant be sentenced to a term of imprisonment of thirty-six (36) months.

The Government also agrees that any statements or testimony given by the defendant pursuant to questions asked by federal agents or prosecutors as a result of this agreement will not be used against the defendant nor will anything derived from the

statements or testimony be used against the defendant except for the purpose of impeachment. However, all parties understand that any statements or testimony given by the defendant can be used as leads or for any other reason against other persons. Further, the defendant fully understands that should he commit perjury or give false statements to federal agents, the statements and testimony can be used to prove those offenses, and he faces additional criminal charges.

The defendant agrees to forfeit and give to the United States prior to the date of sentencing any right, title and interest which the defendant may have in the assets listed in "Exhibit A" attached to this agreement and any assets or interest in assets, including but not limited to cash assets, negotiable instruments, securities, property or other things of value, including any and all property which has been transferred or sold to or deposited with any third party, known or unknown by the defendant for a period of not less than 10 years prior to the date of the signing of this agreement that were involved in, used in, intended for use in, or obtained through illegal drug dealing, as well as any asset, interest, or proceeds defendant received or could receive or cause to be received by a third party in the future, directly or indirectly, in whole or in part, from defendant's illegal activities.

The defendant further agrees to submit to interview whenever and wherever requested by law enforcement authorities regarding all assets within his possession or those assets transferred or sold to or deposited with any third party as outlined within the preceding paragraph. It is also understood that defendant will fully cooperate in providing any and all financial information and documentation, agrees to voluntarily execute a complete and thorough "Financial Statement," Form OBD-500 (attached), and to provide the attached list of documents. The defendant understands that information may be provided to a representative of any victim of this offense.

The defendant understands that the statements set forth above represent defendant's entire agreement with the Government;

there are not any other agreements, letters, or notations that will affect this agreement.

Very truly yours,

EDDIE J. JORDAN, JR.
UNITED STATES ATTORNEY

/s/ John F. Murphy
JOHN F. MURPHY
Assistant United States Attorney

/s/ J. Garrison Jordan _____ 5/25/95
J. GARRISON JORDAN Date
Attorney for the Defendant

_____ _____
RON S. MACALUSO Date
Attorney for the Defendant

/s/ Frank Mascarello _____ 5/25/95
FRANK MUSCARELLO Date
Defendant

* * *

EXHIBIT A

A 1989 Ford F-150 pickup truck, bearing Louisiana license plate number S170448, with Vehicle Identification Number (VIN)1FTDF15N6KNA144, registered to the defendant, Frank J. Muscarello, Sr.

[Filed May 25, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL DOCKET
NO. 95-002
v. SECTION: "E"

FRANK J. MUSCARELLO, SR.
VINCENT J. PARDO

FACTUAL BASIS

Should this case proceed to trial the government would prove the following through competent evidence:

Prior to December 8, 1994, agents of the Drug Enforcement Administration (DEA) utilized an undercover cooperating individual (CI), who audio recorded conversations in which the defendant Frank Muscarello negotiated and arranged to deliver marijuana to the CI and a potential buyer. The "buyer" in fact was a DEA special agent working in an undercover law enforcement capacity.

At approximately 7:55 a.m. on December 8, 1994, the CI met the defendant Frank Muscarello at a graveyard on Highway 442 in Tickfaw, Louisiana. The CI introduced and undercover DEA special agent to Frank Muscarello and the UCA gave Frank Muscarello $2,400.00 as an advance payment for two pounds of marijuana. Frank Muscarello then departed in his Ford pick-up truck to pick up the marijuana for the undercover DEA agent.

At approximately 8:54 a.m., surveillance law enforcement agents observed Vincent Pardo leave his residence in a Ford Thunderbird and meet with Frank Muscarello at the Tickfaw Louisiana Town Hall. Frank Muscarello then departed the Town Hall and drove past the undercover DEA agent and the CI and motioned for them to follow Frank Muscarello in his Ford truck.

The DEA agent and the CI followed Frank Muscarello to an intersection of Highway 442 and Hebert Lane where defendant Frank Muscarello pointed to a green garbage bag on the side of the road. Frank Muscarello told the DEA agent that the marijuana was in the bag.

After the DEA agent picked up the marijuana the DEA agent once again met with Frank Muscarello and the DEA agent gave Frank Muscarello $7,200.00 for six (6) more pounds of marijuana. Mr. Muscarello departed the area and was observed by surveillance agents as he drove to Vincent Pardo's residence. Defendants Muscarello and Pardo then left the residence together and drove back to the location of the DEA agent.

Defendants Muscarello JM then took the CI and the undercover DEA agents to an area off Highway 442, on Herbert Lane, and JM removed green plastic bags from his vehicle, containing marijuana. The DEA agent took possession of the marijuana.

A total of approximately eight (8) pounds of marijuana was distributed by defendants Pardo and Muscarello with the assistance of a third defendant Gary Morgan. Payment for the marijuana and negotiations between the DEA agent and the defendant Frank Muscarello occurred in his Ford truck. A total of $9,600.00 was paid to the DEA agent by the co-conspirators to the distribution of marijuana.

Located inside the glove compartment of the defendant Muscarello's Ford truck was a loaded firearm which the defendant knowing possessed in his vehicle and carried for protection in relation the above described drug trafficking offense.

The DEA laboratory has tested and confirmed that the substance distributed was in fact marijuana, a Schedule I drug controlled substance.

Should this case proceed to trial the government would prove the following with the testimony of the undercover DEA agent and the cooperating individual. Tape recordings of the drug distribution would be offered as well as the testimony of surveillance officers that observed the distribution. Finally, a

DEA chemist would be called the confirm that the substance distributed was in fact marijuana.

/s/ J.L.F. Murphy
AUSA

/s/ J. Garrison Jordan
Attorney for Defendant Frank Muscarello

/s/ John Diguilo
Attorney for Pardo

/s/ Vincent J. Pardo

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,	Criminal Action No. 95-002
Plaintiff,	Section "E"(4)
v.	New Orleans, Louisiana
FRANK MUSCARELLO, SR. ET AL,	May 25, 1995
Defendant.	

REARRAIGNMENT
BEFORE THE HONORABLE MARCEL LIVAUDAIS, JR.,
UNITED STATES JUDGE

APPEARANCES:

For the Government,	United States Attorney's Office By: JOHN F. MURPHY, ESQ. 501 Magazine Street New Orleans, Louisiana 70130
For Frank Muscarello,	Seale, Macaluso, Daigle & Ross By: J. GARRISON JORDAN, ESQ. 200 North Cate Street Post Office Drawer 2787 Hammond, Louisiana 70404
For Vincent J. Pardo,	Law Office of John E. DiGiulio By: JOHN E. DIGIULIO, ESQ. 331 St. Ferdinand Street Baton Rouge, Louisiana 70802

* * *

[2] PROCEEDINGS
(Thursday, May 25, 1995)

(Call to Order of the Court)

THE COURT: Good morning.

MR. MURPHY: Good morning, Your Honor.

MR. JORDAN: Good morning, Judge.

THE COURT: Won't you please be seated.

This is Criminal Action 95-002, *The United States versus Muscarello and Pardo*.

MR. MURPHY: Good morning, Your Honor. John Murphy on behalf of the United States.

MR. DIGIULIO: John DiGiulio on behalf of Vincent Pardo, Your Honor.

MR. JORDAN: And Your Honor, Garrison Jordan on behalf of Defendant Frank Muscarello.

THE COURT: Very well. And I'm told that this is to be a Rearraignment then?.

MR. MURPHY: Yes, Your Honor.

THE COURT: And Mr. Muscarello is to plead guilty perhaps to Counts 1, 2, and 3, am I correct?

MR. JORDAN: That's correct, Your Honor.

THE COURT: And Mr. Pardo to Counts 1 and 2, right?

MR. DiGIULIO: Yes, Your Honor.

THE COURT: Okay. We'll go first with Mr. Muscarello, if he's present.

[3] MR. JORDAN: He is present, Your Honor.

THE COURT: Okay. There was some confusion. I believe I was told that the plea agreement, I received a copy of it, but a substitute was to be made?

MR. MURPHY: Your Honor, there was an error in the maximum penalty, so, which your law clerk alerted me to and I have corrected those. The maximum penalties are, in fact, 15 years with a mandatory minimum five years on Count 3, a fine of $750,000 and a three year period of supervised release. That's the correct —

THE COURT: And so that was the change.

MR. MURPHY: And that has been changed.

THE COURT: It has been made on Page 1 then?

MR. MURPHY: Page 1 and the supervised release on Page 2.

THE COURT: All right.

Mr. Muscarello, before I accept your plea I have to ask you certain questions and you can certainly discuss them with your attorney before you answer them. I'll be glad to repeat them if necessary.

DEFENDANT MR. MUSCARELLO: All right, sir.

THE COURT: And I'll have to have your answers under oath so I'll ask that you be sworn.

* * *

[4] FRANK J. MUSCARELLO, SR., DEFENDANT, SWORN

* * *

THE COURT: You understand, of course, that all answers given under oath in open court, if not truthful, might later be the basis for a perjury or a false statement prosecution?

DEFENDANT MR. MUSCARELLO: Yes.

THE COURT: Have you taken any narcotic drugs or pills or medicines or consumed any alcoholic beverages in the past 24 hours?

DEFENDANT MR. MUSCARELLO: No, sir. I take regular medicine for my heart and stuff.

THE COURT: Other than the medication that is prescribed for you, have you taken any?

DEFENDANT MR. MUSCARELLO: That's right. No, nothing.

THE COURT: I ask that because I just want to make sure. Do you understand what this proceeding is about today?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Counsel, do you have any doubt as to your client's competency to plead at this time?

MR. JORDAN: No, sir.

THE COURT: Have you had a full opportunity to discuss this matter with your attorney?

[5] DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Are you satisfied with the services of your attorney?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And you have read and understand this three count Indictment against you?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Do you understand that if I accept your guilty plea you would not be entitled to a trial or an appeal, and the Government would not be required to prove you guilty, because by pleading guilty you're giving up those rights?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And do you understand that if you were to maintain your plea of not guilty, you would have a right to be represented by an attorney, either one you chose for yourself or one appointed for you?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: You would have a right to remain silent.

DEFENDANT MR. MUSCARELLO: Yes sir.

THE COURT: And at a trial the Government would be required to confront you with witnesses upon whose testimony it relies to obtain a conviction, and you could cross-examine those witnesses.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And at a trial you would be presumed [6] innocent until such time, if ever, that the Government overcame that presumption and established your guilt by competent evidence beyond a reasonable doubt.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And at a trial you could subpoena witnesses on your behalf.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Also, you could testify if you wanted to, but nobody could force you to testify.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And if you plead guilty and I accept your plea, you understand that you would waive your right to a trial and appeal, and the other rights I've just discussed. There would be no further trial. I would just simply enter a judgment of guilty and sentence you on the basis of the guilty plea.

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Are you willing to waive and give up your right to a trial by jury or a judge?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And you have discussed with your attorney these three counts. I'm going to just review them with you to make sure we understand each other. That Count 1 says that on or about December 8, 1994, you and others intentionally, knowingly combined and conspired and agreed to distribute a [7] quantity of marijuana. That's in Count 1.

In County 2, that the three of you did knowingly distribute a quantity of marijuana.

And Count 3 is that on that date you knowingly used and carried a firearm, a Smith & Wesson 38 caliber revolver. Those are the three counts that you have discussed with your attorney and you understand?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: You understand those counts?

DEFENDANT MR. MUSCARELLO: Yes sir.

THE COURT: In the factual basis you talk about eight pounds.

Is that correct, Mr. Murphy?

MR. MURPHY: Your Honor, that's the quantity that the Government alleges and that's the total quantity the Government alleges.

THE COURT: And that's the quantity that would affect the guidelines?

MR. MURPHY: That's correct, Your Honor.

THE COURT: So, eight pounds brings the guidelines — well, a maximum sentence just by itself,what is the eight pounds?

MR. MURPHY: The statutory maximum would be five years; five years each for the conspiracy, five years for the distribution.

[8] THE COURT: Eight pounds. Now, if —

MR. MURPHY: For eight pounds.

THE COURT: For the eight pounds.

MR. MURPHY: The confusion that I had that has now been corrected is that the 20 years applies only when you have quantities in excess of 100 pounds.

THE COURT: All right. Well, I just wanted — since the Indictment just said "a quantity," I just wanted to make sure we understand we're talking about eight pounds.

MR. MURPHY: That's correct, Your Honor. And the Government sets that forth in its factual basis.

THE COURT: Yes. Well, did you, in fact, do the acts charged in the Indictment that we've just reviewed?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And the mandatory minimum sentence which I must impose on you is five years. Do you understand that this is a mandatory minimum sentence?

DEFENDANT MR. MUSCARELLO: Yes.

THE COURT: And the maximum possible sentence which could be imposed in the event of conviction as to Counts 1, 2 and 3, either on a plea of guilty or after trial is, as to Count 1, a period of imprisonment up to a maximum of five years and/or a fine of $250,000. To Count 2, the same, a period of imprisonment up to a maximum of five years and/or a fine of up to $250,000. And as to Count 3, a period of [9] imprisonment of five years and a fine of up to $250,000. Those three things are the maximum, do you understand that?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And you understand that should a period of imprisonment be ordered, you maybe placed on a term of supervised release up to a maximum of three years?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: This is not a restitution question at all.

MR. JORDAN: No, Your Honor.

THE COURT: Do all Counsel agree that I've correctly explained the maximum sentence?

MR. MURPHY: Yes, Your Honor.

MR. JORDAN: Yes, Your Honor.

THE COURT: Well, do you understand that under the Sentencing Reform Act of 1984, the U.S.Sentencing Commission has issued guidelines for judges to follow. Have you discussed these guidelines with your attorney?

MR. JORDAN: Yes, sir, at length.

Say yes.

DEFENDANT MR. MUSCARELLO: Yes.

THE COURT: Have you discussed them with your attorney?

DEFENDANT MR. MUSCARELLO: Yes. Yes, sir.

THE COURT: Do you understand that I may or may not [10] decide to sentence you within the guidelines?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Do you understand that I could decide to impose a sentence on you that is greater or lesser than those determined by the guidelines, depending on what other circumstances I find?

DEFENDANT MR. MUSCARELLO: Yes, Your Honor.

THE COURT: And do you understand that I won't even know what the guidelines are until after the Probation Service has prepared them and given you a copy of them, to your attorney, and the Government a copy to give you opportunities to make corrections or objections or changes to them?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: And then when I do get them, you understand that I could still decide to sentence you below them, within them, above them, depending on the facts that I may determine?

DEFENDANT MR. MUSCARELLO: Yes, Your Honor.

THE COURT: And in the copy of the plea agreement, I haven't seen the signed one, but I presume it's the same, in this plea agreement, you say or it is said, "The Defendant hereby expressly waives the right to appeal his sentence on any grounds including any appeal right addressed in Title 18, United States Code, Section 3742.

"And the Defendant further agrees not to contest his [11] sentence in any post conviction proceeding including, but not limited to, a proceeding under Title 28, United States Code, Section 2255.

"The Defendant, however, reserves the right to appeal the following: A. Any punishment imposed in excess of the statutory maximum. B. Any punishment to the extent it constitutes an upward departure from the guideline range deemed most applicable by the sentencing court."

You and your attorney have discussed this provision of the plea agreement and you understand it?

DEFENDANT MR. MUSCARELLO: Yes, Your Honor.

THE COURT: So, there is the plea agreement and if the signed copy is available I'll review it.

MR. MURPHY: Yes, Your Honor. I'm offering the plea agreement, and as the Court mentioned earlier, that's the same plea agreement that I had provided earlier except for the corrected statutory maximum penalties.

THE COURT: All right. I see where you have made the change on Page 1 and the three years on Page 2.

Do all of you agree that this plea agreement constitutes the entirety of the agreement you've made amongst yourselves?

MR. MURPHY: Yes, Your Honor. Although I would like to elaborate on one point. There is a paragraph in there that says that in the determination of the United States, if Mr. [12] Muscarello provides substantial assistance, the Government will move by way of filing a motion, asking that a sentence of 36 months by imposed.

THE COURT: Yes, I saw that. But it says in the sole discretion of the United States.

DEFENDANT MR. MUSCARELLO: Correct.

MR. MURPHY: And that determination has been made now, Your Honor. That, in fact, the assistance Mr. Muscarello has been — had provided already, in the view of the United States, and in the view of the U.S. Attorney, has risen to the level of substantial assistance.

THE COURT: Very well. Then though you may not have it typed and prepared now — or do you?

MR. MURPHY: We do, Your Honor.

THE COURT: Okay.

MR. MURPHY: And the Government would offer this.

THE COURT: And I'll accept it.

MR. MURPHY: It's a motion under seal that, in effect, puts that paragraph into effect. Mr.Muscarello understands that that's a motion made by the United States and that it's up to the Court to determine whether the motion will be granted or not.

THE COURT: Well, what Mr. Murphy just said, Mr. Muscarello, is that I could decide to ignore this if I wanted to. This does change the mandatory minimum and if I accept [13] it, I'm no — you wouldn't be necessarily concerned with that mandatory five years. I do not have to accept it, you understand?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: I will review it and consider it, but I can tell you from my past experience, the Government is very stingy

about making letters like this and they don't just make them arbitrarily. And when they do, they mean what they say, and to the best of my knowledge, I've never refused one. But I still have to review it. You understand that?

DEFENDANT MR. MUSCARELLO: Yes, sir.

THE COURT: Well, has anyone connected with the Government or anybody connected with any law enforcement agency or anybody made any prediction or prophecy or promise to you as to what your sentence would be, other than the recommendation?

DEFENDANT MR. MUSCARELLO: No, sir.

THE COURT: Now, the Government provided me with a factual basis which I've read and I can ask the Government to read it over or we could just file a copy of it in the record, if you all would sign it.

MR. MURPHY: Your Honor, I have a copy signed by all individuals, I guess, except for Mr. Pardo. He needs to sign that.

THE COURT: That same factual basis will apply to Mr. [14] Pardo, so —

DEFENDANT MR. MUSCARELLO: Sure.

MR. MURPHY: It does, Your Honor.

THE COURT: Yes.

MR. MURPHY: And his attorney will sign it, I just didn't see —

THE COURT: All right. Well, instead of — if everybody is in agreement, I'll let that file be filed into the record without the necessity of it being read now.

So, Mr. Muscarello, do you understand the Government's evidence and do you agree that that's what you did?

DEFENDANT MR. MUSCARELLO: Yes, sir. Yes, sir.

THE COURT: Because I find that the plea is knowledgeable and voluntary and has a basis in fact that contains all the elements

of the crime, I will accept your guilty plea and the accompanying plea agreement and enter a judgment of guilty on your plea.

I'm going to order the customary pre-sentence report, which I'm sure your attorney has explained or will explain to you, and schedule sentencing for — it's hard to believe, is it really that — August 16, 1995 at 9:00 a.m. The year sure goes by in a hurry.

The Defendant is on bond and I've had no request that he be incarcerated. In other words, everybody seems to be [15] agreeable that he may remain on the present bond, am I correct?

MR. MURPHY: That's correct, Your Honor.

THE COURT: Very well, he may remain free on the present bond.

MR. MURPHY: Your Honor, I have one more matter to file in connection with Mr. Muscarello. Pursuant to this plea agreement, he has agreed to forfeit his vehicle and has signed a consent decree for forfeiture. And I would offer that along with an order of forfeiture at this time.

THE COURT: Being no objection, I will receive it for the record.

MR. JORDAN: No objection.

THE COURT: Anything further on this issue?

MR. MURPHY: No, Your Honor.

MR. JORDAN: No, Your Honor.

THE COURT: Thank you.

* * * * *

(Whereupon the portion of the Hearing concerning Mr. Muscarello was then concluded)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,	Criminal Action No. 95-002
Plaintiff,	Section "E"(4)
v.	New Orleans, Louisiana
FRANK J. MUSCARELLO, SR.,	April 10, 1996
Defendant.	

MOTION TO QUASH AND/OR MOTION TO DISMISS
BEFORE THE HONORABLE MARCEL LIVAUDAIS, JR.,
UNITED STATES JUDGE

APPEARANCES:

For the Government,	United States Attorney's Office By: JOHN F. MURPHY, ESQ. 501 Magazine Street New Orleans, Louisiana 70130
For the Defendant,	Seale, Macaluso, Daigle & Ross By: RON S. MACALUSO, ESQ. By: J. GARRISON JORDAN, ESQ. 200 North Cate Street Post Office Drawer 2787 Hammond, Louisiana 70404

* * *

[2] PROCEEDINGS
(Wednesday, April 10, 1996)

(Call to Order of the Court)

THE COURT: Good morning.

MR. MURPHY: Good morning, Your Honor.

MR. JORDAN: Good morning, Your Honor.

THE COURT: Won't you please be seated.

We have Criminal Action 95-002, *The United States versus Frank J. Muscarello*.

Would Counsel make their appearance for the record, please?

MR. MURPHY: Good morning, Your Honor. John Murphy on behalf of the United States.

MR. JORDAN: Good morning, Your Honor. Garrison Jordan for the Defendant, Frank Muscarello, who also appears in Court.

THE COURT: This is a Motion to Quash or Dismiss Count 3 of the Indictment?

MR. JORDAN: Yes, sir.

THE COURT: All right. You may proceed, sir.

MR. JORDAN: Thank you, Your Honor. Your Honor, we had brought this motion pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure. I don't believe there is any procedural objection to bringing the motion by the Government.

[3] THE COURT: No, the motion is properly before the Court.

MR. JORDAN: All right. Thank you, Your Honor.

THE COURT: I don't think there's any dispute about that.

MR. JORDAN: Your Honor, I don't think the facts are in dispute either regarding the weapon involved.

THE COURT: And as a matter of fact, as I read this and as I understand the case, both from the memoranda Counsel has supplied and from the Pre-trial Order, the Government effectively concedes, or maybe my words aren't right, that Mr. Muscarello did not use the weapon. So, this is just a question of did he carry it. And your motion strikes the fact that the Bailey — he didn't carry it, as Bailey should be interpreted from it.

MR. JORDAN: Correct. And that is our position, Your Honor. The Government goes to great lengths to say that Bailey does not apply and that Mr. Muscarello, in fact, did carry the weapon, basically, because it was located in the vehicle. Our position on that is that Bailey is applicable. It was — the decision was rendered after the plea was entered to by Mr. Muscarello. We think that Bailey applies and therefore the statute, 18:924(c)(l) is inapplicable or Mr. Frank Muscarello did — the plea was not to a crime, based on the Bailey decision.

[4] We also, it is our position that Bailey, the rationale of Bailey should apply to the carry prong also in this situation, that a gun that is locked in a glove compartment does not constitute carrying. The Government is seeking to say that constructive possession of a gun in a vehicle constitutes carrying. It is our position that the Bailey decision which says active employment should be used as a test to determine whether someone used a weapon, should also be used in the carrying aspect, because both of them are related to in and during relation of a narcotics offense or drug trafficking offense.

The gun was not easily accessible. It was locked in the glove compartment. Therefore, we say Bailey applies and that the Count 3 should be quashed and/or dismissed.

THE COURT: Thank you, sir.

MR. JORDAN: Thank you, Your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: Your Honor, the Government agrees that this is a carry case. In the Indictment the Defendant was charged under both use and carry. And although Bailey limits use under

924(c), it leaves completely intact the carry prong. And the Government has cited a Fifth Circuit case that seems to be right on point. It is cited in the brief, *United States* —

THE COURT: Is that *Pinedo Arturo* (phonetic)?

[5] MR. MURPHY: Yes, sir.

THE COURT: Yes, but that proceeded Bailey.

MR. MURPHY: That — but —

THE COURT: And that case said carry, or whatever word, in relation to.

MR. MURPHY: And in this case, Your Honor, we do have in relation to. In the factual basis agreed to by both parties, the —

THE COURT: Yes, but that was prepared by the Government.

MR. MURPHY: It was agreed to by both the Defense and signed by the Defendant himself —

THE COURT: That was prepared —

MR. MURPHY: — and the Government.

THE COURT: Well, that was prepared for a guilty plea thing.

Did you read Paragraph 16. I believe it is, of the Pre-sentence Report? Do you have it?

MR. MURPHY: I can check the —

THE COURT: Well, I'll read it for you. It's Paragraph 16 of the Pre-sentence Report. "As to the weapon, Muscarello does not deny his possession of the pistol. The pistol was in the glove compartment of his truck where is had been for a long period of time. He denies any conscious decision to carry the gun in relation to the marijuana sale, [6] and stated that he carried it in relation to his job with the Tangipahoa Parish Sheriff's Office, as a bailiff at the courthouse in Amite.

MR. MURPHY: Your Honor, that is —

THE COURT: Presumably, as a long employment history in the law enforcement, he was the Chief of Police. And I would imagine the Chief of Police carried it in the glove compartment too. So, I'm of the opinion that this Pre-sentence Report, with further analysis by the probation officer, discussing the matter with everybody, that Mr. Muscarello carried that gun in the glove compartment of his car as — and had been doing so for a long period of time, and he carried it for his job duties.

MR. MURPHY: Your Honor, if I may address that point. In the factual basis he does say that he carried it in —

THE COURT: But he — the factual basis was prepared by your office for the limited purpose of coming — or for a guilty plea. The Pre-sentence Report is a much more thorough and analytical document.

MR. MURPHY: Well, Your Honor, the Government —

THE COURT: So, I disagree.

MR. MURPHY: Okay. May I simply just say for the record, Your Honor, that it's the Government's position that defendants often times try and present the most favorable side of their case to a probation officer. But when looking at [7] whether or not a provident plea has been entered as to each and every element, the factual basis really should be the controlling document. And there was no dispute that the —

THE COURT: Not the way it was prepared. I don't —

MR. MURPHY: And Your Honor, it's the Government's position, there is no dispute that, in fact, he agreed that he carried the weapon for his protection in relation to the drug trafficking offense.

THE COURT: Yes, but those typewritten words were put in by your office.

MR. MURPHY: Well, Your Honor, I would —

THE COURT: I just disagree with you.

MR. MURPHY: I would —

THE COURT: I don't care what the factual basis says. In fact, grammatically, imperfect anyway.

MR. MURPHY: Your Honor, the only other point —

THE COURT: But that's not your fault.

MR. MURPHY: The only other point I would make is that the weapon was close to him. It was within —

THE COURT: Because he was outside the car when he was arrested, wasn't he?

MR. MURPHY: He — when be was arrested, but he traveled to the point in the vehicle where the gun was —

THE COURT: Well, if he wanted to use the weapon when the cops came up or whatever — the cops didn't come up, you [8] had undercover people. He would have unlocked the glove compartment and blasted away.

MR. MURPHY: Well, Your Honor, the only —

THE COURT: He's out of the car. He gets arrested. "Have you got a gun?"

"Yes, it's in the glove compartment."

They asked somebody else, "Have you got a gun?"

"Yes, it's" wherever it was, a 9 millimeter pistol. The Government doesn't even choose to do anything about that. They do something in Muscarello's case, and then hit me with a very strong 5K letter saying, oh, yes, the guidelines are six to 12, so 12 plus 60, that's 72 months. You hit me with a 5 letter saying cut him down to 36 months. Why? Is that because you felt you treated him unfairly —

MR. MURPHY: No, Your Honor.

THE COURT: — as opposed to the other one?

MR. MURPHY: That was because we received substantial assistance regarding Co-defendant Pardo.

THE COURT: Well, why didn't you indict the other guy?

MR. MURPHY: And —

THE COURT: Why didn't you include the other guy in Count 3?

MR. MURPHY: The reason we didn't charge Mr. Pardo with the gun is we did not recover the gun at the point of the [9] arrest or the point of the drug activity. A gun, some time later, a number of hours later, was recovered and we could not, in good faith, link it —

THE COURT: Well, he wasn't arrested at the scene, was he?

MR. MURPHY: The gun — he was not arrested at the scene and the gun was recovered later.

THE COURT: You followed him home and you got him?

MR. MURPHY: In another location. And we could not, in good faith, establish that Mr. Pardo's weapon —

THE COURT: Well, but that's beside the point anyway.

MR. MURPHY: — was part of the — of the deal.

THE COURT: That's fine.

MR. MURPHY: Your Honor, the Government would simply say that we feel that this case clearly meets the elements of Pinedo, which is not affected by Bailey.

THE COURT: Pinedo preceded Bailey. And one of the words, your own words, of Pinedo, Criteria Number 3 in Pinedo "The operator of the vehicle knowingly possessed the firearm during and in relation to a drug trafficking — a drug trafficking crime.

MR. MURPHY: And that's conceded.

THE COURT: That's the third element of Pinedo.

MR. MURPHY: That's conceded by the Defense.

THE COURT: But that's not conceded by the Defendant [10] in a piece of paper you give him at the time of a guilty plea, to sign and — well, I don't agree with you, sir.

MR. MURPHY: Okay. Well, Your Honor, that's really the totality of the Government's point.

THE COURT: Well, I understand.

MR. MURPHY: That it is undisturbed by Bailey. That it meets the elements of Pinedo. And that it was a carry. And the Government would ask that the Court not to strike this. And we do not think Mr. Muscarello was treated unfairly. He did provide substantial assistance regarding Co-defendant Pardo. Pardo pled, in part, I think, or substantially because of the assistance Mr. Muscarello provided, and it's proper that he receive that credit.

Mr. Pardo is not charged with the gun because we couldn't establish he had a gun at the time of the offense.

THE COURT: That has nothing to do with this, truly. I was just asking you out of curiosity.

MR. MURPHY: That was the — and I think that's sound prosecutorial decision making on the part of these two Defendants.

THE COURT: Well, I understand your position and your argument. And it's well stated and well placed, I just happen to disagree with it.

Thus, I'm going to grant the motion and I will assign written reasons which I've prepared almost and in final shape [11] now and I was just waiting until this argument. And I will submit or give those written reasons today.

Now, let me ask you this: I have the Pre-sentence Report, which I've had for a long time. Is there any reason we need to delay the sentence?

MR. MURPHY: I would ask that, Your Honor. And the reason I would is there is a third defendant, Mr. Morgan, who has an interlocutory appeal with the Fifth Circuit.

THE COURT: That has been there a long time, hasn't it?

MR. MURPHY: I talked with the attorney in my office who is handling the case, Rich Westling, yesterday. He advised me that he anticipate a ruling from the Fifth Circuit within a month.

THE COURT: Your check is in the mail.

MR. MURPHY: And it was argued several months ago.

THE COURT: I know.

MR. MURPHY: And —

THE COURT: Okay. Well, I'm — I just asked. It seems to me I've got all the paperwork I need. We don't need a supplemental pre-sentence report because Counts 1 and 2 are covered by the guidelines and this Count 3 is really not covered by guidelines. It's just a statutory, mandatory, on top.

MR. MURPHY: We would ask that —

[12] THE COURT: So, I'm — I've got a pre-sentence report here that says six to 12 months.

MR. MURPHY: The sentencing right now, Your Honor, is set for some time in the future. We'd like to keep it there.

THE COURT: Now, I'm not trying to push it on you. I just asked why. It isn't logical. I mean, I could do it right now, you know. If that's — I can understand your position if you want to wait for the rest of it. No one has been sentenced, right? Morgan is on appeal. Pardo has not been sentenced?

MR. MURPHY: That's correct.

THE COURT: And neither has Mr. Muscarello?

MR. MURPHY: That's correct, Your Honor.

THE COURT: Well, if you — well, I'll put it this way, if you all change your mind and want me to do the sentencing, I'm prepared to do it right now, today, or whatever you say.

MR. MURPHY: Your Honor, we would ask for the delay.

THE COURT: I can understand because of the other Defendants, the same picture, so I do understand that. But if you change your mind, let me know.

MR. MURPHY: And Your Honor, I just would —

THE COURT: I would assume, also, you're — since now, that Count 3 is out, you may appeal that or you may wait until sentencing to appeal it, or whatever. You have a [13] guideline factor and your 5K letter — well, I guess since the guidelines are what they are, they're practically meaningless. But you're going to also present the 5K for my consideration on a six to 12 month guideline?

MR. MURPHY: Your Honor, obviously, if this ruling stands, it would affect the recommendation.

THE COURT: Well, that's —

MR. MURPHY: However, the Government would maintain that Mr. Muscarello has provided substantial assistance. We don't change our recommendation in that regard.

THE COURT: I understand.

MR. MURPHY: But it would obviously be of a different —

THE COURT: Well, in other words, what you could — might reasonably interpret if he's going to change it so that you would say the bottom of the guidelines rather than step below the guidelines. And that the guidelines as they stand now, if there doesn't seem to be any objection to them, six months.

Well, let me know what you want me to do.

Anybody have anything else for the record at this time?

MR. JORDAN: No, Your Honor. No.

MR. MURPHY: No, Your Honor.

THE COURT: Thank you. We'll stand in recess then.

[14] MR. MACALUSO: Just add this. Ron Macaluso, also the Defendant, Your Honor.

THE COURT: Yes?

MR. MACALUSO: We intend — Mr. Muscarello intends continue to cooperate and testify if needed by — on request of the Government.

THE COURT: Oh, that's right. We have — didn't all three plead guilty?

MR. MURPHY: No.

THE COURT: Okay.

MR. MURPHY: What — one has not pled, Mr. Morgan.

THE COURT: I see. That's —

MR. MURPHY: He's got an appeal with the Fifth Circuit.

THE COURT: Now, I see now about the sentencing.

MR. MACALUSO: The purpose of the motion was not to get out of the plea agreement, but other than —

THE COURT: Okay.

MR. MACALUSO: But other than to raise the legal issue that Your Honor has addressed. So, for the Government's information and Your Honor's information, we still intend to cooperate and testify as called upon.

THE COURT: All right.

MR. MACALUSO: Thank you.

THE COURT: Thank you very much.

[15] MR. JORDAN: Thank you, Your Honor.

MR. MURPHY: Thank you, Your Honor.

THE COURT: Court is in recess.

* * * * *

(Whereupon the Hearing was then concluded)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO. 95-2**
versus	
FRANK J. MUSCARELLO	**SECTION: "E"**

RULING ON
DEFENDANT'S MOTION TO QUASH
AND/OR DISMISS COUNT 3 OF THE INDICTMENT

Entered on April 10, 1996

(Found in the Appendix to the Petition for Certiorari at 8a-11a)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
versus	**NO. 95-2**
FRANK J. MUSCARELLO	**SECTION: "E"**

RULING ON GOVERNMENT'S MOTION REQUESTIONING RECONSIDERATION OF "QUASH AND/OR DISMISSAL" ORDER

Entered on May 6, 1996

(Found in the Appendix to the Petition for Certiorari at 12a-13a)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellant,

v.

FRANK J. MUSCARELLO,
Defendant-Appellee.

No. 96-30591

OPINION OF THE COURT

Decided February 13, 1997

(Found in the Appendix to the Petition for Certiorari at 1a-7a)

SUPREME COURT OF THE UNITED STATES

No. 96-1654

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI.

Filed December 12, 1997

The Petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. This case is consolidated with No. 96-8837 - *Donald E. Cleveland and Enrique Gray Santana v. United States* and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.

December 12, 1997